

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Rates for Interstate Inmate Calling Services ) WC Docket No. 12-375  
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 )  
 )

To: Commission

**COMMENTS OF GEORGIA DEPARTMENT OF CORRECTIONS**

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January 12, 2015

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## EXECUTIVE SUMMARY

Based on its extensive expertise in the corrections field gained from the operation of the fifth largest correctional system in the nation, the Georgia Department of Corrections (“GDC”) believes that it is ideally suited to determine the best means of managing and funding its inmate calling services (“ICS”) program. Although GDC appreciates the renewed focus on ICS by correctional agencies resulting from the Federal Communications Commission’s (“Commission”) ICS proceeding, GDC encourages the Commission to limit the scope of its intervention into the processes used by correctional agencies to hire ICS subcontractors.

The Communications Act of 1934, as amended (“Communications Act”), does not provide the Commission with authority to regulate intrastate ICS rates or the site commissions that correctional agencies charge ICS providers. Neither of the statutes cited by the Commission in its Second Further Notice of Proposed Rulemaking, Sections 276(b)(1)(A) and 201(b), provide adequate Commission authority for such regulatory intervention. Section 276(b)(1)(A) plays no role in setting interstate end-user payphone rates, including ICS rates, and does not authorize the Commission to ban activities, such as site commissions, that the Commission deems unhelpful to the ultimate realization of fair compensation. Similarly, Section 201(b) provides the Commission with no authority over intrastate ICS rates because the effective scope of Section 201(b) is limited to interstate telecommunications. In addition, Section 201(b)’s scope is not so infinitely expandable as to permit the Commission to regulate site commissions, which the Commission has characterized as an apportionment of ICS providers’ profits.

Moreover, assuming *arguendo* that the Commission possessed adequate jurisdiction to regulate site commissions, the Commission nevertheless should defer to state and local correctional agencies with respect to their contractual arrangements with ICS providers, the

operation and funding of their ICS systems, and how best to fund and accomplish the reduction of recidivism through inmate welfare programs. For this reason, it would be inappropriate for the Commission to prohibit the payment of site commissions or to mandate that all correctional agencies hire multiple ICS providers to serve their facilities. Further, the dearth of meaningful data currently on the record regarding the ICS costs incurred by correctional agencies, standing alone, prevents the Commission from taking any further action with respect to the recovery by correctional agencies of their ICS costs.

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**COMMENTS OF GEORGIA DEPARTMENT OF CORRECTIONS**

The Georgia Department of Corrections (“GDC”) hereby submits these Comments in response to the Commission’s Second Further Notice of Proposed Rulemaking (“*Second FNPRM*”)<sup>1</sup> issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned docket. The *Second FNPRM* seeks comment on certain Commission proposals to further regulate inmate calling services (“ICS”) and asks whether the Commission has jurisdiction and authority under the Communications Act of 1934, as amended (“Communications Act”), to promulgate its proposed ICS regulations.

Through this proceeding, the Commission has focused additional attention by state and local correctional agencies on ICS, which is a beneficial result. GDC believes, however, that the Commission should be highly circumspect when its proposed regulation of telecommunications matters, such as ICS, impacts the corrections field. As part of this cautious approach, the Commission should refrain from taking an expansive view of its statutory authority, and should avoid dictating to the professional corrections community how they should manage their facilities, including how they should select and contract with third-party ICS providers.

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<sup>1</sup> *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 13170 (2014) (“*Second FNPRM*”).

As set forth herein, the Communications Act does not provide the Commission with authority to regulate site commissions or intrastate ICS rates. In addition, even if such authority could be found in the Communications Act, the Commission should defer to the expert judgment of state and local correctional agencies regarding their contractual arrangements with ICS providers, including with respect to site commissions. Moreover, the Commission currently does not have adequate data regarding the ICS costs incurred by correctional agencies to make any meaningful determinations regarding such costs.

**I. GDC IS AN EXPERT CORRECTIONAL AGENCY WITH SUBSTANTIAL EXPERIENCE AND EXPERTISE IN ITS FIELD**

Relying on a team of approximately 12,000 corrections professionals and with a budget of over \$1.2 billion, GDC oversees more than 50,000 offenders in GDC's correctional facilities, as well as more than 160,000 probationers. It is the largest law enforcement agency in the state of Georgia. Georgia has the fifth largest inmate population in the United States. GDC is administered by a Commissioner, who oversees the GDC professional staff, and an 18-member Board of Corrections which provides policy guidance.

According to GDC Commissioner Brian Owens:

[GDC's] challenge [is] to insure we provide the citizens of this great state an uncompromised level of public safety while we take steps to address the increasing size of our offender population, largely due to recidivism. We have already begun taking the right steps to fight recidivism and promote more effective offender re-entry programming across our offender and probationer populations. We're doing what research says should be done. We're moving beyond solely brick and mortar solutions to crime and expanding our re-entry initiatives – starting with the first day an offender enters our custody and supervision. This approach also enables us to partner with communities and key leadership across the state that want to help us win the “war” against recidivism in Georgia.<sup>2</sup>

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<sup>2</sup> Georgia Department of Corrections, Executive Operations, <http://167.192.44.227/Divisions-/ExecutiveOperations/ExecutiveOperations.html> (last visited Jan. 9, 2015).

As part of this effort, GDC provides more than a dozen risk reduction programs to inmates in each facility across Georgia. *Each* of these programs increases public safety by decreasing recidivism. For example, in addition to recidivism risk services, including substance abuse counseling, cognitive-behavioral programs, and faith- and character-based programming, GDC also offers a comprehensive vocation-skills program that provides training to inmates in the following fields:

- Auto Body Repair
- Braille
- Building Maintenance
- Cabinetry/Carpentry
- Commercial Driver's License
- Computer Officer/Technology
- Computer Repair A+
- Construction
- Cosmetology/Barbering
- Culinary Arts
- Diesel Mechanics
- Drafting Electrical Wiring
- Electronic Technology
- Equine Rescue Program
- Food Preparation/Culinary Arts
- Graphic Arts/Printing
- Heating/Air Conditioning
- Horticulture
- Masonry/Tile Setting
- Plumbing
- RESCUED Dog Program
- Service Industry
- VISION Guide Dog Program
- Welding

Other recidivism risk services provided by GDC include: (i) substance abuse counseling, (ii) cognitive behavioral programs and (iii) faith and character based programming. These programs demonstrate GDC's commitment to inmate welfare, including reducing recidivism.

## **II. THE COMMUNICATIONS ACT DOES NOT PROVIDE THE COMMISSION WITH AUTHORITY TO REGULATE SITE COMMISSIONS OR INTRASTATE ICS RATES**

The *Second FNPRM* requests comment on whether site commissions paid to correctional facilities, or any equivalent payments, may be regulated or prohibited altogether.<sup>3</sup> The Commission also seeks comment on regulating intrastate ICS rates and related charges in various

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<sup>3</sup> *Second FNPRM*, 29 FCC Rcd at 13182-91 ¶¶ 21-46.

ways.<sup>4</sup> The Commission cites both Sections 201(b) and 276(b)(1)(A) as possible sources of authority for restricting site commissions and Section 276(b)(1)(A) as a possible source of authority for regulating intrastate ICS rates and ancillary charges.<sup>5</sup> GDC respectfully suggests that neither of those provisions provides adequate authority for either category of regulation.

**A. Section 276(b)(1)(A) Does Not Provide the Commission With Authority to Regulate Intrastate ICS Rates**

Section 276(b)(1)(A) authorizes the Commission to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphones.”<sup>6</sup> That provision, which is cited in the *Second FNPRM* as possible authority over intrastate ICS rates,<sup>7</sup> does not provide such authority – not because it does not cover intrastate calls, but because Section 276 has nothing to do with end-user rates, or at least the toll rates at issue in this proceeding.<sup>8</sup> Rather, the purpose of Section 276(b)(1) was simply to ensure that payphone service providers (“PSPs”) receive fair compensation from the interexchange carriers (“IXCs”) that provide services from their payphones on “completed intrastate and interstate” “dial-around calls.” Because those carriers are paid by the end users on such calls, it was necessary to impose a regulatory scheme to ensure

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<sup>4</sup> *Id.* at 13191-01 ¶¶ 47-79.

<sup>5</sup> *Id.* at 13184 ¶¶ 29-36, 13200 ¶ 75, 13204-05 ¶¶ 85-86.

<sup>6</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>7</sup> *Second FNPRM*, 29 FCC Rcd at 13184 ¶ 29 n.106, 13200 ¶ 75 & n.217, 13204 ¶ 85 & n.255.

<sup>8</sup> *See, e.g.*, Comments of Securus Technologies, Inc. on Further Notice of Proposed Rulemaking, WC Docket No. 12-375, at 4-5 (Dec. 20, 2013) (“Securus Comments”).



a fair division of dial-around revenues between the IXC's receiving the end users' payments and the PSPs.<sup>9</sup> As the Commission has explained:

. . . Congress previously mandated . . . that PSPs must provide to consumers using their payphones access to all IXC's. As result, PSPSs have minimal leverage to negotiate with these IXC's for a fair compensation amount for delivering calls to the IXC's' networks. Indeed, this concern was one of the fundamental reasons why Congress adopted the compensation provisions of section 276.<sup>10</sup>

Thus, under the scheme contemplated by Section 276(b)(1)(A), it was the IXC's that provided service to, and were paid by, end users initiating calls at payphones, not the PSPs. IXC's' end-user rates have always been subject to, and regulated under, Section 201(b), not Section 276(b).<sup>11</sup> Section 276(b)(1) was intended only to ensure that PSPs were compensated fairly by IXC's for providing payphone service on those calls.

Moreover, consistent with that purpose, the Commission determined that PSPs were entitled to compensation under Section 276(b)(1) only if they otherwise were not entitled to compensation, such as pursuant to a contract. As the Commission explained, "whenever a PSP is able to negotiate for itself the terms of compensation for the calls its payphones originate, then

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<sup>9</sup> The purpose of Section 276(b)(1) was explained in several of the Commission's prior orders related to Section 276 and the Commission's regulation of PSPs thereunder. *See, e.g., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2548-51 ¶¶ 3-12 (1999) (subsequent history omitted) ("*Third Payphone Order*"). *See also* Securus Comments at 4-5.

<sup>10</sup> *Third Payphone Order*, 14 FCC Rcd at 2551 ¶ 12 (citations omitted).

<sup>11</sup> *See, e.g., AT&T Communications Revisions to Tariff F.C.C. Nos. 1 and 2*, Memorandum Opinion and Order, 7 FCC Rcd 5656, 5656 ¶ 2 (1992) (conditioning purchase of 800 service on customer's purchase of more competitive interexchange service was an unreasonable practice under Section 201(b)).

our statutory obligation to provide fair compensation [under Section 276(b)(1)] is satisfied.”<sup>12</sup>

Thus, in the case of inmate payphones, “inmate PSPs tend to receive their compensation pursuant to contract, which makes them ineligible to receive a per-call compensation amount.”<sup>13</sup>

The history recited in the *Report and Order* appears to incorrectly restate previous decisions.<sup>14</sup> The *Illinois Public* case cited in the *Report and Order* does not stand for the proposition that Section 276(b)(1)(A) was intended generally to ensure fair rates for end users.<sup>15</sup> The discussion in that case cited by the Commission addressed the anomalous situation of local coin calls. Because PSPs are compensated for such calls only by the caller’s deposit of coins, rather than by IXC’s, the court held that the Commission has authority to regulate the rates for local coin calls.<sup>16</sup> That rationale is irrelevant to the intrastate non-coin calls at issue in the ICS context.<sup>17</sup>

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<sup>12</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21269 ¶ 72 (1996) (citation omitted) (subsequent history omitted).

<sup>13</sup> *Id.* See also Comments of CenturyLink, WC Docket No. 12-375, at 2-6 (Dec. 20, 2013) (attachment to Letter from Thomas Dethlefs, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC).

<sup>14</sup> Rates for Interstate Inmate Calling Services, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14132 ¶ 46 (2013) (“*Report and Order*”) (characterizing concept of fair compensation as balancing compensation for ICS providers and cost paid by “the end-user”).

<sup>15</sup> *Illinois Pub. Telcoms. Ass’n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (“*Illinois Public*”), cert. denied sub nom. *Virginia State Corp. Comm’n v. FCC*, 523 U.S. 1046 (1998), cited in the *Report and Order*, 28 FCC Rcd at 14176-77 ¶ 137.

<sup>16</sup> *Illinois Public*, 117 F.3d at 562.

<sup>17</sup> See also Securus Comments at 6-7; Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 12-375, at 7-12 (Dec. 20, 2013).

Accordingly, the Commission's authority to regulate ICS end-user rates is provided by Section 201(b). Section 276(b)(1)(A) plays no role in setting any end-user long-distance rates or any ICS rates. Moreover, because Section 201(b) is sidelined by Section 2(b) of the Act in the case of intrastate calls,<sup>18</sup> the Commission has no authority to regulate intrastate inmate end user calling rates.

**B. Neither Section 201(b) Nor Section 276 Authorizes the Regulation or Prohibition of Site Commissions**

Even if Section 276(b)(1)(A) were applicable to ICS end user rates, interstate or intrastate, neither that provision nor Section 201(b) would authorize the regulation or prohibition of ICS providers' payment of required site commissions. Both the text of those provisions and the overall scope of the Communications Act preclude the Commission from reaching into ICS providers' dealings with correctional facilities and overseeing an activity as distant from the provision of payphone service as the payment of commissions.

Section 201(b) requires all charges and practices "for and in connection with" an interstate common carrier service to be "just and reasonable."<sup>19</sup> The phrase "for and in connection with" is not infinitely expandable, covering any activity somehow related to the provision of telecommunications services. For example, the Commission has held that, because the provision of incumbent carrier unbundled network elements ("UNEs") does not constitute the provision of telecommunications service, AT&T's denial of UNEs to another carrier was not "for

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<sup>18</sup> 47 U.S.C. § 152(b).

<sup>19</sup> *Id.* § 201(b).

or in connection with” an interstate service, even though the other carrier needed the UNEs to provide telecommunications services.<sup>20</sup>

Section 276(b)(1) is even narrower in scope. As discussed above, it authorizes the Commission only to “establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for” completed calls using their payphones.<sup>21</sup> It does not authorize the Commission to ban any activities that it deems unhelpful to the ultimate realization of fair compensation. Rather, even assuming *arguendo* that Section 276(b)(1) applies to end-user rates, it only authorizes the Commission, in this context, to determine how much inmates pay ICS providers per call. The Commission did that in the *Report and Order*, including a determination that site commissions are not a compensable ICS cost.<sup>22</sup> That is the outer limit of what the Commission may do regarding site commissions. Banning site commissions goes far beyond “establish[ing] a per call compensation plan” and attempts to direct what ICS providers do with their profits.

As the Commission pointed out in the *Report and Order*:

[T]he fact that payments from *excess revenues* are made to correctional facilities is not relevant in determining whether ICS rate are cost-based and thus just, reasonable, and fair under sections 201(b) and 276. Moreover, . . . site commission payments . . . are simply payments made for a wide range of purposes, most or all of which have no reasonable and direct relation to the provision of ICS.<sup>23</sup>

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<sup>20</sup> *Saturn Telecomms. Servs. Inc. v. BellSout Telecomms., Inc. d/b/a AT&T Florida*, Order on Reconsideration, 29 FCC Rcd 12520, 12530 ¶ 24 (2014).

<sup>21</sup> 47 U.S.C. § 276(b)(1)(A).

<sup>22</sup> *Report and Order*, 28 FCC Rcd at 14135-38 ¶¶ 54-58.

<sup>23</sup> *Id.* at 14137 ¶ 55 (emphasis added and citation omitted).

Because the payment of site commissions “ha[s] no reasonable and direct relation to the provision of ICS,” it cannot be a “practice[]” “for and in connection with” the provision of ICS under Section 201(b) and is irrelevant to determining fair compensation for ICS calls under Section 276(b)(1)(A).

In the *Report and Order*, the Commission also noted that, in establishing a compensation plan, it was not required “to make judgments about the management and operation of correctional facilities.”<sup>24</sup>

Articulating cost-based rates in other contexts has not required us to make judgments about how the customers of various communications providers run their businesses. For example, in determining whether location rents were compensable costs in the traditional payphone context, the Commission did not make any inquiry into the *management or operation of the businesses in which payphones were located*. Nor do we need to do so here.<sup>25</sup>

Unlike disallowing the cost of site commissions in setting rates, restricting or banning site commissions altogether would interfere directly with “the management or operation of the [prison facilities] in which payphones [are] located,” which is far outside the Commission’s scope of authority or the terms of Sections 201(b) or 276(b)(1)(A).<sup>26</sup>

The vast gulf between the authorizations in Sections 201(b) and 276(b)(1)(A), on one hand, and regulating ICS payments to facilities, on the other, is similar to the requested

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<sup>24</sup> *Id.* at 14136 ¶ 55 n.205.

<sup>25</sup> *Id.* (emphasis added) (citation omitted).

<sup>26</sup> The Commission implicitly recognized that the reform of site commissions was beyond its scope of authority when it noted in 2002 that “any solution” to the problems caused by high site commissions “must embrace the state[] [correctional authorities].” *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand & Notice of Proposed Rulemaking, 17 FCC Rcd 3248, 3260 ¶ 29 (2002) (subsequent history omitted).

Commission relief rejected in *Illinois Citizens*.<sup>27</sup> There, petitioners requested that the Commission take steps to ensure that the construction of the Sears Tower in Chicago did not cause interference with TV broadcasts in the surrounding area, arguing that the Commission's jurisdiction extended to all activities that "substantially affect communications."<sup>28</sup> The U.S. Court of Appeals for the Seventh Circuit affirmed the Commission's denial of the requested relief:

The "affecting communications" concept would result in expanding the FCC's already substantial responsibilities to include a wide range of activities, whether or not actually involving the transmission of radio or television signals much less being remotely electronic in nature. . . . Indeed to so find where building construction is concerned would be to enmesh the FCC in a variety of local considerations and an often complex local regulatory scheme.<sup>29</sup>

The assessment or payment of site commissions similarly is not "remotely electronic in nature" or related to communications transmission, and interference with such requirements will "enmesh the FCC in a variety of local considerations and an often complex local regulatory scheme," often involving state or local government requirements to impose such site commissions.<sup>30</sup>

*Illinois Citizens* cited *Regents v. Carroll*, in which the Supreme Court held that, while the Commission may impose conditions relating to a broadcaster's financial condition in the exercise of its power to grant a broadcast license, it may not directly affect the broadcaster's contractual

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<sup>27</sup> *Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7<sup>th</sup> Cir. 1972).

<sup>28</sup> *Id.* at 1399.

<sup>29</sup> *Id.* at 1400.

<sup>30</sup> See *Second FNPRM*, 29 FCC Rcd 13190 ¶ 45, 13217-18 ¶¶ 116-17 & n.361.

obligations to a third party, even though those obligations might have an impact on the broadcaster's financial condition.<sup>31</sup>

The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant. . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.<sup>32</sup>

Similarly, the Commission may have the authority to prohibit ICS providers from recovering the cost of site commissions in their rates, but it has no authority "to determine the validity of contracts between" the ICS providers and "others" that impose those site commissions.

In *California Water and Tel. Co.*, the Commission held, prior to the enactment of Section 224 of the Act, that it did not have authority to regulate cable television companies' access to non-telephone utility poles because the provision of pole or conduit space does not constitute "communication by wire or radio."<sup>33</sup>

Further, the activities at issue are too remote from cable television service to be properly considered as an activity "incidental to such transmission" . . . . The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites. Such a reading comes close to the "affecting communications" concept rejected by the Commission and the seventh circuit in [*Illinois Citizens*].<sup>34</sup>

The payment of site commissions is similarly "too remote from" the provision of ICS "to be properly considered as" such provision of service. If site commissions themselves – as opposed

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<sup>31</sup> *Regents of Univ. Sys. of Georgia v. Carroll*, 338 U.S. 586 (1950).

<sup>32</sup> *Id.* at 600, 602.

<sup>33</sup> *California Water and Telephone Co.*, Memorandum Opinion and Order, 64 F.C.C.2d 753, 758 ¶ 14 (1977) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968)).

<sup>34</sup> *Id.* at 758-59 ¶¶ 14-15.

to the treatment of costs in the setting of ICS rates – may be regulated or banned altogether, the Commission could ban any required ICS payment to a third party, including the payment of state and local taxes, under the rationale that such prohibitions might someday reduce rates.

The *Report and Order* cited cases for the proposition that the Commission may modify provisions in private contracts between carriers and others when the public interest requires.<sup>35</sup> In those cases, however, the modifications at issue were necessary either to change telecommunications service rates found to be unlawful<sup>36</sup> or to prohibit exclusive service arrangements that precluded customers from seeking telecommunications services from competing carriers.<sup>37</sup> Site commissions, by contrast, “have no reasonable and direct relation to the provision of ICS.”<sup>38</sup> Now that the *Report and Order* has determined that site commissions are not a compensable cost in the setting of ICS rates but instead are an apportionment of ICS provider profits,<sup>39</sup> the actual payment of those commissions has no logical nexus with ICS rates. Sections 201(b) and 276(b)(1)(A) thus provide no authority to regulate an activity as “remote from” the provision of ICS as the payment of site commissions.<sup>40</sup>

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<sup>35</sup> See, e.g., *Western Union Tel. Co. v. FCC*, 815 F.2d 1495 (D.C. Cir. 1987) (“*Western Union*”); *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008) (“*Competitive Networks*”), cited in *Report and Order*, 28 FCC Rcd at 14162 ¶ 101 n.365.

<sup>36</sup> *Western Union*, 815 F.2d at 1501.

<sup>37</sup> *Competitive Networks*, 23 FCC Rcd at 5385 ¶ 1.

<sup>38</sup> *Report and Order*, 28 FCC Rcd at 14137 ¶ 55 (citation omitted).

<sup>39</sup> *Second FNPRM*, 29 FCC Rcd at 13173 ¶ 4 (citation omitted).

<sup>40</sup> *California Water and Tel. Co.*, 64 FCC2d at 758 ¶ 14. The *Second FNPRM* also cites the prohibition on gifts from service providers to schools and libraries participating in the E-rate program to ensure compliance with the competitive bidding rules for distribution of E-rate funds. *Second FNPRM*, 29 FCC Rcd at 13187 ¶ 38. The broadly worded provisions of Section 254 of the Act (e.g., “[t]he Commission shall establish competitively neutral rules . . . to enhance . . .



### **III. THE COMMISSION SHOULD NOT REGULATE CORRECTIONAL AGENCIES' CONTRACTUAL RELATIONSHIPS WITH ICS PROVIDERS BECAUSE THEY ARE OUTSIDE OF THE COMMISSION'S CORE EXPERTISE**

In designing, implementing, and administering its penal, rehabilitative, and budgetary policies, including its ICS program and contracting procedures, GDC brings a level of real-world expertise and experience to these activities that significantly exceed the understanding of the corrections field that the Commission, the expert federal agency with respect to telecommunications, will develop in the course of this proceeding. Promoting general inmate welfare, including by reducing recidivism, is a very complex matter and involves numerous interconnected considerations, including very real budgetary constraints. Moreover, ICS is a highly particularized communications niche that is greatly impacted by security and other concerns that, unlike correctional facilities, the Commission does not deal with on a day-to-day basis. For these reasons, the Commission should refrain from attempting to further regulate the contractual arrangements between correctional agencies and ICS providers.

#### **A. The Commission Should Not Regulate Site Commissions**

As set forth above, the Commission's authority under the Communications Act does not extend to the regulation of site commissions, much less their outright prohibition. However, even if the Communications Act provided the Commission with authority to regulate site commissions, the Commission should refrain from doing so because the private contractual arrangements between correctional facilities and their third-party subcontractors are significantly outside of the Commission's core expertise. By contrast, the state and local governmental agencies that run correctional facilities are experts in the corrections field and, through decades

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access to advanced telecommunications and information services for all public and nonprofit . . . school classrooms") (47 U.S.C. § 254(h)(2)), easily encompasses such competitive bidding rules, but nothing in Sections 201(b) or 276(b)(1)(A) authorizes such an interference with dealings with third parties.

of experience, have developed a real-world understanding of the complexities of managing inmate welfare. As a result, consistent with the Commission's general policy of deferring to other expert governmental agencies, the Commission should defer to state and local correctional agencies with respect to how to fund and manage their provision of ICS to inmates.

Like other correctional agencies, the GDC is required to make complex and challenging decisions on a daily basis regarding how to balance the competing priorities that are involved in managing the welfare of inmates. As part of its decision making process regarding how to deploy its limited financial resources to run its correctional facilities, GDC has determined in its judgment how to fund programs meant to promote inmate welfare and reduce recidivism, including ICS. Site commissions are an important component of this calculus, and the Commission should not attempt to substitute its judgment for the judgment of state and local correctional agencies with respect to this matter.

ICS is just one, integrated part of a correctional agency's much larger and, in the case of the GDC system, incredibly expansive and complex operation. Given the Commission's limited perspective regarding the many interconnected aspects of the operation of correctional facilities, any intervention by the Commission into facilities' ICS programs is likely to have currently unforeseeable and unintentional consequences. For example, by eliminating site commissions, which are an important part of the funding in many facilities of their inmate welfare programs, the Commission may cause correctional agencies to reduce important inmate services aimed at reducing recidivism. Consequently, rather than supporting the Commission's stated goal of reducing recidivism, the elimination of site commissions may have a net negative impact on the ability of correctional agencies to achieve this shared objective. More fundamentally, the elimination of site commissions may cause some correctional agencies to reduce their investment

in ICS, which, in turn, may have the overall effect of reducing the ability of inmates to remain in communication with their friends and family members while incarcerated.

**B. The Commission Should Not Regulate the RFP Process Used by Correctional Facilities to Retain ICS Providers**

The Commission also should not attempt to dictate to correctional facilities the manner in which they issue ICS-related request for proposals (“RFPs”) and award contracts to ICS providers. Correctional procurement is a specialized government function, often involving detailed and explicit acquisition procedures, regulations, and statutes mandated by state and local governments. In addition, ICS operations are very different than the business of telecommunications companies that cater to the general public. ICS involves dramatically heightened security concerns that require close supervision of the use of the service, including tight controls over who inmates call and sophisticated call monitoring and archiving technologies, as well as highly specialized equipment. Consequently, ICS personnel are highly trained professionals in the corrections field that have extensive experience in the provision and safe use of ICS.

For these reasons, state and local correctional agencies award specialized contracts that reflect the needs of their inmates and staffs. The Commission should not attempt to second-guess the manner in which these expert agencies conduct their RFP processes. Importantly, it would be fundamentally inappropriate for the Commission to mandate that all correctional agencies hire multiple ICS providers to serve their facilities. The administrative and technical complexity of such an undertaking would be prohibitive and the operational and capital costs would be enormous. GDC believes that any effort by the Commission to artificially induce ICS competition in this manner would backfire and ultimately would result in the need to significantly increase ICS rates. In addition, the Commission should not attempt to regulate the

non-monetary benefits that correctional agencies seek from ICS providers through the RFP process. Correctional agencies regularly leverage the exclusivity that they provide to ICS providers to obtain concessions that ultimately benefit inmates, such as the replacement of aging equipment, the introduction of new features and capabilities, and the development of innovative new ICS technologies.

#### **IV. THE COMMISSION DOES NOT HAVE ADEQUATE DATA TO MAKE MEANINGFUL DETERMINATIONS ABOUT THE ICS COSTS INCURRED BY CORRECTIONAL AGENCIES**

As set forth herein, GDC believes that the Communications Act does not provide the Commission with authority to regulate site commissions, and, even if it did have such authority, the Commission should refrain from doing so. If, despite this, the Commission determines to attempt to promulgate such regulations, the Commission must first have a clear understanding of the actual ICS costs incurred by correctional agencies, which, by its own admission it currently does not have.<sup>41</sup> It would be arbitrary and capricious for the Commission to make determinations about such costs, or how they are recovered by correctional agencies, without such data.<sup>42</sup> To obtain such an understanding, the Commission will need to provide some level

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<sup>41</sup> The *Second FNRPM* acknowledges that the record is comprised of limited sets of dramatically conflicting data regarding ICS costs incurred by correctional agencies. *See Second FNRPM*, 29 FCC Rcd at 13189 ¶ 42 (“We seek comment on [submitted] estimated costs, particularly on *why they vary so significantly*, and the underlying assumptions, i.e., staffing costs and time commitments.”) (emphasis added); *see also id.* at 13189 ¶ 41 (“We note that . . . the costs submitted by the providers do not include any costs that may be incurred by facilities.”). Moreover, this cost data was provided to the Commission by ICS providers rather than correctional agencies.

<sup>42</sup> *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agencies may not “entirely fail[] to consider an important aspect of the problem”).

of guidance to correctional agencies as to how to quantify these costs in a manner that is useful to the Commission, just as the Commission did with respect to ICS providers.<sup>43</sup>

Like all correctional agencies, GDC incurs substantial costs in connection with its ICS functions. This point has been noted on the record in this proceeding by numerous correctional agencies and related governmental entities, as well as by certain ICS providers.<sup>44</sup> However, there is very little information in the record about the magnitude of these costs and the data that is available to the Commission is conflicting.<sup>45</sup> Like many correctional agencies, GDC does not make a standard practice of breaking out its ICS costs in its budgets in a way that accurately reflects its overall monetary and non-monetary operational and capital expenditures associated

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<sup>43</sup> Based on third-party reviews of the data sets filed by ICS providers, it is clear that the Commission's data collection process with respect to ICS providers has been imperfect. Letter from Lee G. Petro, counsel for Martha Wright, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (filed Sept. 17, 2014) (finding in its evaluation of cost data filed with the FCC by ICS providers that, *inter alia*, "[t]he ICS providers inconsistently allocated their costs among the four cost categories (Telecom, Equipment, Security, Other); [t]he ICS providers used different methodologies to allocate costs to facilities and payment methods; [and] [t]he ICS providers followed different approaches in determining direct and common costs). When providing guidance to correctional facilities regarding ICS cost reporting, the Commission may be able to avoid some of the problems that it discovered in the cost data reported by ICS providers.

<sup>44</sup> See, e.g., Letter from John Bishop, Executive Director, Oregon State Sheriffs' Association to Tom Wheeler, Chair, FCC, et al., WC Docket No. 12-375 at 2-3 (dated Jan. 5, 2015); Letter from Lt. William Deatsch, Johnson County Sheriff's Office (Tennessee), to FCC, WC Docket No. 12-375, at 1 (dated Dec. 18, 2014); Letter from John R. Layton, Marion County Sheriff (Indiana) to Tom Wheeler, Chairman, FCC, WC Docket No. 12-375 at 2 (dated Dec. 8, 2014); Letter from James R. Voutour, Sheriff, County of Niagara (New York), to Marlene H. Dortch, FCC, WC Docket No. 12-375 (dated Dec. 1, 2014); Letter from John M. Foster Jr, Chief Deputy, Yell County (Arizona) Sheriff's Department, to Marlene H. Dortch, FCC, WC Docket No. 12-375 (dated Nov. 25, 2014). GDC incurs ICS costs in most of the cost categories reported by other correctional agencies in the foregoing filings, as well as additional costs specific to GDC's ICS operations.

<sup>45</sup> *Second FNPRM*, 29 FCC Rcd at 13189 ¶ 42 (noting that estimates provided by certain ICS providers of ICS costs incurred by correctional agencies are inconsistent by a significant margin).

with ICS. Nevertheless, in an effort to provide useful data to the Commission, GDC made a good faith effort to do so. Based on this analysis, GDC preliminarily estimates that it incurs ICS costs that equate to approximately \$0.07 per minute of inmate calling.<sup>46</sup>

For estimates of this nature to be useful, however, they must be uniform and standardized across each reporting correctional agency. The only way for this to occur is for the Commission to provide explicit guidance regarding how correctional agencies should calculate their ICS costs, such as the cost matrix that the Commission provided to ICS providers. Until this has occurred, the dearth of meaningful data on the record regarding the correctional agencies' ICS costs, standing alone, prevents the Commission from taking further action with respect to site commissions.

## **V. CONCLUSION**

The Commission should acknowledge and respect the limits of its authority under the Communications Act with respect to ICS, and this jurisdiction does not extend to the contractual arrangements between correctional agencies and ICS providers (or to intrastate ICS rates). In addition, even if the Commission possessed adequate jurisdiction to regulate such agreements,

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<sup>46</sup> GDC utilized a comprehensive survey to identify all of the day to day tasks performed by its employees relative to the provision of ICS at its prison facilities. There were over 50 day to day tasks on the survey separated into 6 categories: Accounting, Administrative, Investigative, Operational, FCC Compliance, and RFP/Contracting. Each GDC employee (with the exception of Transitional Center employees), who has any involvement or interaction with ICS, completed the survey identifying the total number of hours per day spent on each task within the separate 6 categories. The daily hours were calculated and summarized at the weekly level and monthly level. Each employee's total monthly hours were then multiplied by the corresponding employee hourly salary rate, inclusive of loaded costs, to determine the employee's total monthly cost related to ICS.

The total monthly cost for all ICS related tasks was calculated to be \$166,835.59. To quantify its ICS related costs at the per-minute level, GDC identified its average monthly minutes of use – currently 2,314,871 in monthly calling minutes. GDC's per minute ICS cost of \$0.07 was determined by dividing the monthly cost amount of \$166,835.59 by the average minutes of 2,423,842.

the Commission should defer to the state and local correctional agencies that possess real-world experience and expertise over inmate welfare issues. This includes the operation and funding of ICS functions, as well as the numerous other inmate welfare programs administered by correctional agencies. For these reasons, the Commission should not attempt to regulate site commissions or the RFP process used by correctional agencies to retain ICS providers.

Respectfully submitted,

GEORGIA DEPARTMENT OF CORRECTIONS

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January 12, 2015